Coates' Canons Blog: Removing Elected Board Members From Office

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The *need* to remove an elected member of a local governing board—the city council, the board of county commissioners, or the board of education—may arise when it is discovered that the board member is for some reason disqualified from holding the office. The *desire* to remove an elected board member may arise in a wide variety of circumstances when it appears that the board member, though not disqualified, is incapable of performing or unwilling to perform the duties of the office at an acceptable level or in an acceptable way.

Let's look at North Carolina law of removal when there's a *need* and when there's merely a serious *desire*.

The Need to Remove when a Member Becomes Disqualified

Under the North Carolina Constitution, you must be eligible to vote for an office in order to hold that office. Article VI, Sec. 8 says, "The following persons shall be disqualified for office: . . . with respect to any office that is filled by election by the people, any person who is not qualified to vote in an election for that office."

If a sitting board member becomes disqualified (most likely by moving outside the jurisdiction, but also by being convicted of a felony), he or she must leave office. Votes cast as a sitting member after the disqualification is discovered are subject to challenge, and actions of the board can be thrown into question. For a discussion of issues like this, see David Lawrence's post here.

The member should resign. The resignation would create a vacancy which could be filled in the normal course and the problem would be solved.

What if the member does not resign? First, the board must verify that the disqualification does in fact exist. If the issue is residency, then the board member can simply be asked whether he or she has in fact moved outside the jurisdiction. If the member says yes, the disqualification is verified. If there is no acknowledgement, then any voter of the county may challenge the member's residency through a voter eligibility challenge before the county board of elections under GS 163-85. The elections board will determine the member's residency and thus qualification to vote and thus qualification for office.

Once the disqualification is verified, how is the member removed?

There is no direct statutory procedure set out for cities, counties, or boards of education. For cities, there is a helpful statute, GS 160A-59 that provides this: "When any elected city officer ceases to meet all of the qualifications for holding office . . ., the office is ipso facto vacant." This city statute provides no removal procedure and there is no corresponding statute at all for school boards or for boards of commissioners.

In the absence of a statute, my advice for 25 years has been this: the board should simply vote to declare a vacancy and then proceed to fill the vacancy. That advice has been born of necessity, but I think it works. I recommend it because (1) it is simple to do, (2) it puts the burden on the ousted board member to institute a lawsuit if he or she wishes to challenge the action, and (3) the only applicable statutory alternative—quo warranto—is woefully inadequate.

Quo Warranto

Article 41 of Chapter 1 of the General Statutes, entitled "Quo Warranto," sets out a procedure by which the attorney

general of the state, or an individual with the permission of the attorney general, may bring an action to "try the title or right to any State, county or municipal office." GS 1-521. The action may be brought "When a person usurps, intrudes into, or unlawfully holds or exercises any public office." GS 1-514.

The quo warranto proceeding is an alternative to the procedure suggested above of simply declaring the office of a disqualified board member vacant, but it has several disadvantages. First, the quo warranto legal challenge will be time consuming and costly. Simply declaring a vacancy is quick and cheap. Second only the attorney general or a private citizen with the permission of the attorney general can bring a quo warranto action. Third, if a private citizen brings the action, it must be brought within 90 days of the time the officeholder takes office. And, fourth, simply declaring the vacancy and filling it shifts the burden of bringing the quo warranto action to the board member who is removed.

The Desire to Remove a Member Who is Not Disqualified

The board *needs* to remove a board member who is disqualified. By contrast, the board may *desire* to remove a board member who, while not disqualified, is incapable of performing or unwilling to perform the duties of the office at an acceptable level or in an acceptable way. Can that be done? How?

For 25 years, I have taught that there is no removal option. You are just stuck with the poor board member until the next election when the voters can vote him out. As we will see in a moment, there may in fact be an option in the most outrageous of cases, when a member's conduct, connected with his or her service on the board, is sufficiently extreme that it "challenges the integrity of the governmental process." In the great run of cases, however, where the member is simply a pain in the neck or argumentative or unproductive or lazy or profane or obnoxious, you are stuck.

Special removal statutes

For some elective offices special statutes provide a removal procedure. Those offices are sheriffs (GS 128-16), district attorneys (GS 7A-66), judges (GS 7A-376 and GS 123-5), clerks of superior court (GS 7A-105), and members of the Council of State (GS 123-5).

There is no comparable removal statute for elected local government board members.

Recall

General law in North Carolina does not provide for recall elections for elected officials. Twenty-five cities (including Raleigh, Greensboro, Durham, and Winston-Salem) and two school administrative units do have recall as a possibility by local act of the General Assembly: But for elected board members in the 500 other cities, all 100 counties, and all other elected school boards, recall is not a possibility.

Removal through Legislative Action

Could the General Assembly pass a local act providing this: "Fred Jones is removed as a member of the board of education of Taxfree County?" That is, could the legislature, by local act, remove a member of local government governing board?

The answer to the question appears to be Yes, though such an action by the General Assembly would seem to be unlikely.

In 1925 the North Carolina Supreme Court upheld the authority of the General Assembly to abolish the Hyde County board of commissioners, terminate the terms of the sitting commissioners, and replace them with a new board. It noted that counties "are subject practically to the unlimited control of the Legislature" and that elected officials have "no vested property or contract right to the office to which they [have] been elected of which they could not be deprived by the Legislature." *State ex rel. O'Neal v. Jennette*, 190 N.C. 96.

So legislative removal seems theoretically available, but unlikely.

Criminal Prosecution

There is a crime, in North Carolina, in GS 14-230, called "misbehavior in office." It is a misdemeanor and the statute

provides that the punishment is removal from office by order of the court.

The statue provides that if an office holder "willfully and corruptly omitted, neglected, or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof," he has committed the crime and can be removed from office by the order of the court.

This criminal statute is rarely used. The case can be prosecuted only by the district attorney (like criminal matters generally) and so the affected board cannot take any steps itself, other than to report the alleged misconduct to the district attorney. My research has found no instance of removal of an elected official under this statute in the 1900s or 2000s.

Amotion

What if a member of an elected city council, board of commissioners, or board of education is unwilling or unable properly to perform the duties of the office and, in addition, is creating substantial problems of one sort or another—interfering with meetings, threatening staff members, sexually harassing staff members, engaging in hostile and abusing debate tactics, or in other substantive ways creating conditions adverse to good governance. Is there some way to remove this member, short of waiting till the next election when the voters can remove him?

No removal statute, such as those outlined above for district attorneys and sheriffs and others apply. Unless this is one of the 25 cities or the two school boards listed above, recall is not a possibility. Quo warranto deals with title to office, not conduct in office. These offices are not offices to which impeachment applies under the North Carolina Constitution. The legislature is almost certainly not going to remove the board member by local act. The district attorney is very unlikely to prosecute the board member in a way that could lead to removal.

And unlike the situation where there is a need to remove a disqualified member, the board cannot simply declare a vacancy and proceed to fill it.

Most likely, you are just stuck with the poor board member until the next election when the voters can vote him out. Recent developments make it appear, however, that in the most extreme cases, where the member's conduct connected with board service is so bad that it "challenges the integrity of the governmental process," there may be an option for removal: amotion.

Amotion is a common law procedure by which officers of a corporation can be removed. In two North Carolina cases, from 1883 and 1908, our state supreme court endorsed the use of amotion to remove an elected official.

Is it still available for that purpose?

In 2013, it was used twice. A town council member in the town of Hope Mills was removed, with no further legal action. A county commissioner was removed in New Hanover County, and, after a hearing, a superior court judge decided that amotion continues as a vehicle for removal of an elected official.

Amotion is extraordinary. In the New Hanover matter, the judge said that the court must find "the balance between the extraordinary concept of overturning the results of an election and a set of facts which can also be extraordinary in its presentation of how an elected official has acted or failed to act so as to hamper the functioning of the office to which he or she was elected or create safety, security, or liability concerns arising from his or her action or inaction in office."

Until the legislature speaks to the matter or an appellate court rules in an appropriate case, the status of amotion remains a matter of speculation, though the 2013 cases certainly give it new currency.

Need vs. Desire

Where there is a *need* to remove a board member from the city council, the board of county commissioners, or the school board because the member has become ineligible, my advice is to confirm the ineligibility and then declare a vacancy. Where there is a *desire* to remove a bad (but qualified) member, options are limited. Amotion may work, but the best bet is to wait until the next election.

For a fuller discussion of amotion, see Frayda Bluestein's post here. For a discussion of disqualification from office, see

my post here. For a discussion of leaves of absence for board members temporarily unable to participate, see Frayda Bluestein's discussion here.

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